IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 511.

THE PUEBLO OF SANTA ROSA, *Petitioner*,
vs.
ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, *Respondents*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

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STATEMENT OF THE CASE.

On October 25, 1926, this Honorable Court granted the application of the petitioner, The Pueblo of Santa

Rosa, for the writ of certiorari to review the final decree of the Court of Appeals of the District of Columbia (R. 431) which affirmed a decree (R. 100) of the Supreme Court of the District of Columbia, which dismissed the bill of complaint of the petitioner (Plaintiff), upon the merits with costs. (R. bottom p. 426, and pp. 427, 428-430)

The order of this Court allowing the writ of certiorari provides:

> The petition for a writ of certiorari in this case is granted and the case set for hearing on January 10 next, after the cases heretofore assigned for that day on the issue as to the existence of authority of counsel who filed the bill to represent complainant.

On January 28, 1915, the petitioner here, appellant in the said Court of Appeals and the plaintiff in the court of first instance, to wit: the Supreme Court of the District of Columbia, filed its bill of complaint to restrain the Secretary of the Interior and the Commissioner of the General Land Office from opening the plaintiff's land for entry to settlers as part of the government domain under the laws of the United States. (R. 1-10)

On February 20, 1915, the defendants (respondents) filed a motion (R. 11-12) to dismiss, in the nature of a demurrer, which was sustained by the trial court and a final decree was entered April 25, 1916, dismissing the bill, with costs to the defendants (R. 22) on the ground set forth in the opinion (R. 12-21) of the trial court, viz., the incapacity of the corporate plaintiff to maintain the suit as alleged in the bill. (R. 21)

Thereupon, the petitioner (plaintiff) appealed to

the Court of Appeals, and on April 27, 1917, that Court having reversed the decree of the trial court, directed the trial court to enter *a final decree* in favor of petitioner (plaintiff) as prayed in the bill (Pueblo of Santa Rosa vs. Lane, 46 App. Cas. D. C. 411 (1917), 47 Washington Law Reporter, 374), for the reason that when the case was argued in the Court of Appeals,

> "*counsel for the defendants* [respondents] *in open court announced that a final decree might be entered in as much as the defendants* [respondents] *did not desire to answer or plead further in the case below.* (Italics supplied) Accordingly, this court [the Court of Appeals] reversed the decree of the Supreme Court [of the District of Columbia] and remanded the cause 'with directions to enter a decree restraining defendants from offering for entry or sale as part of the public domain of the United States any of said lands under any land or mineral land law of the United States, and requiring, insofar as lies within the power of the Land Department, to prevent, in as large degree as possible, any further infringement upon the property rights of the plaintiff.'"

(Opinion, Court of Appeals, R. 425-6 (1926), reported in 54 Washington Law Reporter, 242, 243; 12 Fed. (2d) 332; not yet officially reported in reports of Court of Appeals.)

The foregoing voluntary oral announcement in open court of counsel for respondents (defendants) to the Court of Appeals does not appear in the first opinion of that Court reported in 46 App. Cas. D. C. 411 (1917) but it is set forth by the Court of Appeals in its opinion, on pages 425 and 426 of the present Transcript of Record.

The Court of Appeals, in its opinion, also says (R. 426):

> "The case was appealed by defendants [respondents] to the Supreme Court of the United States, and when it came on for hearing in that Court, the Solicitor General, on behalf of the defendant officers, *notwithstanding the oral stipulation made in this court, insisted upon the right of the defendants to answer in the Supreme Court of the District.*" (Italics supplied)

On the said appeal of the respondents (defendants) to the Supreme Court of the United States, this Court, while fully sustaining the decision of the Court of Appeals (in 46 App. Cas. D. C. 411) in holding that the plaintiff (petitioner here) is entitled to become a suitor for the purpose of enforcing or defending its property interests and that the decision of the Court of Appeals correctly held that the trial court committed error in sustaining defendants' (respondents') motion to dismiss the bill of complaint, the Supreme Court of the United States held that the Court of Appeals ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants (respondents here); and further held that the defendants *were entitled to an opportunity to answer to the merits, just as if their motion to dismiss had been overruled in the court of first instance.* Accordingly, the decrees of the Court of Appeals and of the trial court were reversed, with directions to overrule the motion to dismiss, to afford defendants an opportunity *to answer the bill,* and to grant an order restraining the defendants from in anywise offering, listing, or disposing of any of the lands in question

pending the final decree, and to take such proceedings as may be appropriate and not inconsistent with said opinion. (Lane etc. vs. Pueblo of Santa Rosa, 249 U. S. 110, 114, argued January 29, 1919, decided March 3, 1919).

While the case was pending in the Supreme Court of the United States on said appeal by defendants (respondents), on January 9, 1919—twenty days prior to the oral argument in this Court—in response to a letter from the Solicitor General of the United States, dated January 3, 1919, inquiring by what authority this suit was instituted and maintained, counsel for the plaintiff wrote a letter to the Solicitor General advising him that their authority was conferred by the power of attorney and substitution under such power of attorney, copies of which were enclosed in said letter. (R. 36-40; see also R. 33-34)

After the decision of this Court (reported in 249 U. S. 110), and the remand of the case to the trial court, the defendants (respondents), on June 9, 1919, *filed their answer to the merits* (R. 22-33). On the same date, June 9, 1919, the defendants also filed a motion to dismiss this cause, after the case had been pending for over four years, on the ground, viz., "for lack of authority on the part of the attorneys of record of the alleged plaintiff to represent their alleged client or to maintain this suit." (Rec. 33-87)

On April 21, 1921, the trial court entered an order postponing a decision on the above motion to dismiss (filed June 9, 1919) until the final hearing of the cause. (R. 89) A memorandum opinion of the trial court was filed. (Rec. 87-89)

The cause was heard on final hearing, upon the pleadings, evidence and exhibits, "*and also upon the motion*

of the defendants, accompanied by exhibits and affidavits filed herein June 9, 1919, to dismiss the bill of complaint'' (R. 100), *and final decree was entered October 3, 1924* (R. 100), *the first paragraph of which overruled the said motion of defendants of June 9, 1919, to dismiss for lack of authority of counsel to file the bill.* (R. 100) *And the defendants (respondents) entered no appeal therefrom.* (R. 100; Opinion, Court Appeals, R. bottom p. 426 and p. 427) That part of said decree is final. (Cole v. Cole, 49 App. Cas. D. C. 237 (238), s. c. 263 F. 633).

Petitioner (plaintiff) appealed from only that part of the decree which dismissed the bill on the merits, with costs; the notation of appeal advised the court that plaintiff was not appealing from paragraph 1 of the decree, and counsel for defendants endorsed "no objection" thereon. (R. 111)

The trial court filed an opinion "on merits and upon motion to dismiss." (R. 90-100.)

The substance of all of the testimony, and the exhibits set forth in the statement of the evidence, approved by consent of counsel, and settled and signed by the trial court, are contained in the Record at pages 114-422.

From only that part of the final decree dismissing the bill of complaint on the merits, plaintiff appealed to the Court of Appeals of the District of Columbia (Rec. 100, 111, 427) and filed assignment of errors. (Rec. 101-110.) See opinion Court of Appeals (R. bottom p. 426 and 427)

Notwithstanding the fact that the motion of June 9, 1919, of the defendants (respondents) to dismiss the case on the ground of the alleged lack of authority of counsel to file the bill, was overruled by the first

paragraph of the final decree (R. 100), and that no appeal was taken therefrom by defendants (respondents), said defendants as appellees in the Court of Appeals attempted to inject the subject-matter of their said motion into the case.

In disposing of the point, the Court of Appeals says (Rec. beginning bottom page 426 and continuing on page 427):

> "*No appeal was taken by defendants from that portion of the decree overruling the motion, challenging the authority of counsel for plaintiff to represent their client. Plaintiff accordingly limited the present appeal to that portion of the decree dismissing the bill.* (Italics supplied)
>
> "When this case came on for final hearing in the court below, there was a dual trial. The right of counsel to appear for plaintiff was challenged by a motion to dismiss the bill; and the issue of plaintiff's right to a decree was raised by answer to the bill. The court combined the case on the motion to dismiss and on bill and answer and heard testimony thereon both as to the merits and in support of the motion. *The case was decided by denying the motion to dismiss and entering a decree for the defendants on the merits.* The opinion of the court below was confined to holding in effect that counsel for plaintiff have no authority to represent it. *It was error to hear the motion as a part of the case on its merits.* (Italics supplied) A motion challenging the right of counsel to appear for a litigant in no way affects the merits of the case. This question can be raised by a procedure well known to the practice; namely, upon a preliminary motion supported by affidavits setting forth the facts and asking for a rule requiring counsel to show cause why the objections to his appearance should not be sustained. It cannot be raised by answer, or by a motion to dismiss in eq-

uity, since a plea goes to the merits of the case, while the proceeding challenging the authority of an attorney to appear is between different parties and involves a preliminary matter collateral to the issue on the merits. It in no way affects the right of the party whose attorney is challenged, should the motion be sustained, to employ other and proper counsel to represent him in the further conduct of his case.

"The rule is well stated in the case of Gage vs. Bell, 124 Fed. 371, 379, as follows: 'Necessarily it is the practice in all courts to treat the attorney appearing for a litigant as duly authorized thereto by that litigant. The authority to appear must exist, to be sure, but it is conclusively presumed, or assumed, rather, by the court, unless it is formally, and by a special proceeding known to the practice, called in question. 3 Enc. L. (2d Ed.) 349; Id. 375. The defendant cannot, by answer or plea, set up want of authority in the plaintiff's attorney, but he must make a rule upon him to show his authority, supported by affidavit as to the facts. Id. 377, citing Martin vs. Walker, Abb. Adm., 579, Fed. Cas. No. 9170; Howe vs. Anderson (Ky. 1890) 14 S. W., 216; Hill vs. Mendenhall, 21 Wall 453, 22 L. Ed. 616. The reasons for this rule are well illustrated by this case. The courts could not conveniently do the business of litigation if either litigant could capriciously embody in his pleadings the collateral matter of the authority of the attorneys, respectively, to appear and file their pleadings. Every litigation would degenerate into a preliminary inquiry about the attorney's dealings with his client.'"

"Until the contrary is shown, counsel in a case will be presumed by the court to appear by proper authority, and this presumption cannot be removed by a collateral attack in the pleadings. It is a preliminary matter to be disposed of before proceeding to the merits of the case. *It was, therefore,*

not only improperly injected into the present case, but it came too late. (Italics supplied)

"Coming to the case on its merits, the word 'Pueblo', * * * (R. 428)

The Court of Appeals says (R. 429) that there can be no question that prior to the cession under the Gadsden Treaty, the Papago Indians had acquired a title which was subject to recognition by the Government of Mexico, but that no proceedings were ever instituted to have this title established or made a matter of record; hence, with the cession to the United States, the Indians came to us with no paper title; with nothing more than the prescriptive right which could have been exercised by them as recognized citizens of Mexico; and the Court holds (R. 429) that "this mere prescriptive right" is not protected by the terms of the treaty of Guadalupe Hidalgo, as to be enforceable in the courts; and the Court reaches the conclusion (R. 430) that "the concluding clause of article six of the Gadsden Treaty, under the evidence adduced below, forbids relief by the courts. The power lies alone in Congress to extend to these people protection similar to that thrown around the pueblos of New Mexico, who were more fortunate than plaintiff, merely in that they possessed a proper title from Mexico."

Thereupon, plaintiff filed its petition in this Court for the writ of certiorari. In opposition to its petition, respondents here and defendants below filed their brief wherein they prayed that the writ should not issue for the reason that the decree was proper on the ground that the attorneys of record for plaintiff had no authority to represent the plaintiff (petitioner).

The bill of complaint was filed on January 28, 1915. (R. 1) The defendants were served the same day (R.

10) and appeared in the action January 29, 1915 (R. 11) and on February 20, 1915, filed a motion to dismiss in the nature of a demurrer, under the local practice (R. 11-12) in which no mention was made of alleged lack of authority of counsel. Defendants below (respondents here) at all times recognized the attorneys for petitioner as attorneys of record and served copy of all pleadings upon them.

It is respectfully submitted that in view of all of the foregoing considerations, the alleged lack of authority of counsel who filed the bill to represent the complainant is not an open question.

In view, however, of the order of this Honorable Court, granting the writ of certiorari, the matters relating to the issue of such authority will now be more fully considered.

Petitioner, the Pueblo of Santa Rosa, gave to Robert F. Hunter, on December 8, 1880, a power of attorney to represent them with right of substitution and delegation. (R. 37) On May 31, 1911, Hunter substituted Alton M. Cates, Esquire, and retained him and other counsel on behalf of the Pueblo of Santa Rosa to institute this suit. The bill of complaint was filed by him and associate counsel and they thereafter associated other counsel in the case. The inhabitants and the chief of Santa Rosa had knowledge of the preparation and institution and prosecution of this suit at all times and approved of the action of counsel until April 20, 1918, when under the instructions of the agents of the defendants (respondents), they refused to discuss the suit with their attorneys. The respondents circulated a petition amongst certain of the inhabitants of Santa Rosa, which petitioned the trial court to dismiss this suit. (R. 407)

ASSIGNMENT OF ERRORS COMPLAINED OF BY THE PETITIONER, PUEBLO OF SANTA ROSA, RELIED UPON AS MATERIAL TO THE ISSUE BEFORE THIS COURT, ARE:

Assignment of Error No. 53 and Assignment of Error No. 54 (R. 108-109) are as follows:

"53. The court erred in overruling plaintiff's objection to the question asked by defendants of their witness Frank A. Thackery, and in overruling plaintiff's motion to strike, hereinafter set forth (Record, typewritten pages 408-409).

Q. Did you take any steps to embody this desire of the present day inhabitants of that vicinity that the suit end and not go on, in written form?

Mr. Kleindienst: We object to this on the grounds that it is hearsay—not the best evidence. Let this objection precede the previous question and we move that the answer be stricken.

(Objection and motion overruled; exception noted.)

A. Yes, sir.

Q. Please state just what you did.

A. I had a petition prepared covering the matters stated, included a request for dismissal, and after having it carefully interpreted and explained to these people, they signed it.

Q. State whether any threat, or promise or pressure of any sort was offered or brought to bear upon them or any of them to induce them to sign this petition?

A. No, sir, there was none.

Q. Was the petition itself interpreted in the hearing of these Indians?

A. I don't understand Papago but it was given to the interpreter in each case and I know from his mentioning various words in English through the petition, that he had read it to all of them who

signed. It took a considerable length of time in each case, both preceding and following the reading of the petition. There was in almost every case quite an extended discussion and talk regarding it before they signed. (Petition produced.) The petition contained 181 or 182 signatures. The census of Achi, Akchin, Anegam and Kiacheemuck, which last-named village is marked on the census as Santa Rosa, shows a population of 195 males, over 21 years old. The petition contains a few women. I started out to let the adult women sign the petition also, and afterwards, to avoid making such a cumbersome document, I decided just to take the matter up with the adult men. The women, according to Papago custom, take no part in the councils or agreements or such matters. In addition to the Indians to sign at meetings, quite a few signed who were not asked by me. Where my name appears as a witness opposite a signature, all signed in my presence.

54. The court erred in admitting in evidence a petition known as Defendants' Exhibit 6, the signatures to which defendants' witness Frank A. Thackery, special supervisor in the Indian service of the Interior Department, testified he obtained, reciting that the signatories ask the court to dismiss this suit, to which plaintiff objected on the grounds that the document is a self-serving document of the defendants, and is incompetent, immaterial and irrelevant, and it appears to be a document without date and it is not the best evidence of what it purports to show, which objection was overruled and an exception noted (Record, typewritten page 409). Plaintiff also moved to strike the said petition as not competent as testimony or evidence in the case, as not upon any issue properly raised in the case, and upon the further ground that no opportunity has been given counsel for plaintiff to take up this matter with any of the signers or cross-examine them on it; motion denied; exception noted (R. 405).

SUMMARY OF ARGUMENT.

The lands of the petitioner, the Pueblo of Santa Rosa, were being encroached upon, and the record shows from direct evidence that, in the years 1855, 1856, 1863, 1874, 1876, it, and their chiefs in its behalf made efforts to stop the encroachments upon its land. (R. 164, 165, 166, 181, 185, 186, 193) In the year 1880, the Bishop of the Catholic Church introduced to the various chiefs one Robert F. Hunter, a lawyer, and Lius, Chief of Santa Rosa, together with the head chief of all the Papagos, Jose Maria Ochoa (referred to in the testimony as Con Quien) executed a power of attorney wherein said Hunter was made their attorney in fact with right of substitution and delegation. Hunter thereafter caused the employment of Alton M. Cates (the attorney who filed the original bill, in behalf of Santa Rosa), as attorney for the Pueblo of Santa Rosa; so the suit was lawfully commenced. Mr. Cates (before his death) under his substitution as attorney in fact for the Pueblo and by his being attorney of record in the case, associated other counsel as attorneys for the Pueblo.

In the argument to follow, respondents expect to show that the inhabitants and the Chief of Santa Rosa at all times during the preparation of the suit and during its prosecution up to 1918, had knowledge and approved of the action of counsel.

That the Indian Department and agents of the respondents ordered the inhabitants of Santa Rosa not to confer with their attorneys, and obtained from some individual Indians an *ex parte* petition requesting the trial court to dismiss this suit, while petitioner's counsel were in the field taking depositions of respondents' witnesses with respondents' attorneys. The respon-

dents' attorneys did not inform petitioner's attorney of the petition until five days later when the "deposition party" was more than one hundred miles from Santa Rosa at which time all the signers and Papago witnesses had gone to their respective houses. (Rec. 406-407) Attorneys for petitioner could not go back to confer with them for the reason that they were instructed by respondents' agents not to talk to the attorneys for petitioner. (Rec. 364-365-337-144-391)

If the pendency of an action is known to the inhabitants of a town and reported to the town at a meeting and no opposition or objection made, the opposing side can not raise the question of authority of counsel to defeat the suit. The Town of Delhi vs. James H. Graham 3 Hun. (N. Y.) 407.

Petitioner contends also that the authority of counsel is no part of the merits of a case and can not be raised by the opposing side as a defense to the suit after the merits of the case have been submitted to the court by motion to dismiss in the nature of a demurrer in which motion no question of authority was raised; and an appeal taken from the ruling on said motion to dismiss; and the case has gone through the courts to the Supreme Court of the United States before the question of authority of counsel was raised. In other words, the defendants sat by to see if they would win on the merits and having had the merits decided against them they endeavor to raise this question to defeat the suit, although they had knowledge of the source of petitioner's authority before, in 1885, and it was again furnished to them before the case was orally presented to the Supreme Court of the United States, January 29, 1919 (R. 334)

ARGUMENT.

THE REASON THE POWER OF ATTORNEY WAS EXECUTED TO HUNTER BY LUIS ON BEHALF OF THE INHABITANTS OF SANTA ROSA.

As has been shown in the former decision of the case, the inhabitants have resided in Santa Rosa since the memory of man runneth not to the contrary.

The Gadsden Treaty took effect June 30, 1854 (R. 192) at which time sovereignty of the land in question was ceded to the United States. On June 29, 1855, Major Emory, boundary commissioner on the Mexican border in his report to Congress, for 1854 shows that the Indians, including those of San Xavier, were worried about the title to their lands and what effect the change in sovereignty would have upon their title. The chiefs and head chief travelled two hundred miles to confer with the boundary commissioner who advised them that the treaty protected them in whatever rights they had and that the government would, within a short time, cooperate with them. (R. 185-186) In 1856, the Secretary of the Interior reported to Congress that the Pueblos ceded under the Gadsden Purchase were similar to those of New Mexico. (R. 192) In 1857, Sylvester Mowry wrote to Commissioner of Indian affairs that the Papagos were extremely anxious about tenure of their lands and inquiring if they would be allowed to remain. (R. 164) In 1863, the Superintendent of Indian affairs reported to the Commissioner of Indian affairs that the Papagos were anxious about their title to their lands and the adjustment of boundaries. (R. 166-167) In 1869, Lieutenant Colonel Thomas Devin of the 8th United States Cavalry reported to Commissioner of Indian Affairs that there were encroachments upon the Indian lands which had

made them discontented and their actions and movements caused great uneasiness in the vicinity. (R. 165) In 1874, the Indian Agent reported to the Commissioner of Indian Affairs that the question of title should be settled at once as the Indians were losing mining property, and water holes were being gradually taken from them, and that foreigners were squatting upon their lands (R. 164) In 1876, the Indian Agent reported to Commissioner of Indian Affairs that Mexicans were occupying the lands of the Indians and the Mexicans' stock was grazing upon the Indians' pastures the Indians being crowded out and the Indians requested by a council that they be removed (R. 165). The affairs of the Indians were getting worse, and finally, in 1885, the Indian agent took the attitude that the Indians must be shown that the chiefs are not greater than the government and the agent came to dispose of the chief; that if he was chief he is chief no more (R. 170) although it had been their desire to live at peace with the whites (R. 170).

The hereinbefore complaints of the Papagos had availed them nothing. They appealed to Bishop Salpont, the Bishop of the Catholic Church at Santa Xavier, who brought them in touch with one Robert F. Hunter (a lawyer) as a person to protect the Indians' interest to their lands. (R. 276) There was a room full of Indians. The Bishop was present and was looked upon as their friend and protector (R. 277). The notary public who took the acknowledgment recognized Ascension Rios, chief of San Xavier. An interpreter was present (R. 285) all the witnesses were honorable business men in the community (R. 287). The Indians came for the purpose of executing the power of attorney etc., (R. 289) and executed it (R.

282). Chief Rios was one of the signers and had been official interpreter for the government at various times for many years, since 1874 (R. 228-275)

The occurence before the year 1880, and what happened up until 1909 when their land was opened under the enlarged homestead act of the United States, clearly show that the Pueblo of Santa Rosa and other villages did a wise thing in attempting to engage legal advice to protect their lands.

The Interior Department of the United States has not protected these people as it should have done. If the court at this time should dismiss this suit upon the ground of lack of authority, the merits of the case will never again be presented to a tribunal in their behalf for the action of the respondents and their agents clearly shows that they will not concede ownership of the land to them and they will not allow the inhabitants of Santa Rosa to confer with others with a hope of obtaining unbiased counsel in their behalf.

Emory's assurance to the Pimas (Papagos) that title to their lands under the Mexican Government was good and protected by the treaty (R. 186) was the assurance that should have been given to these people and all three branches of this government should uphold such a promise from any source. Counsel for the petitioner believe that it was a national promise to them that should be seriously considered by our courts.

THE INTERIOR DEPARTMENT OF THE UNITED STATES HAS CONFIRMED THE POWER OF ATTORNEY.

There was introduced in evidence a document (R. 275) headed,

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

Washington, D. C., January 13, 1885.

Directed to Col. Hunter and reads as follows:

"Dear Sir:

The Power of Attorney empowering you to act for the Papago Indians of Arizona is executed in accordance with custom and usage and are authority for you to represent the interest therein designated.

E. L. STEVENS,
Chief Clerk."

Sec. 177-Fed. Stat. Ann. 2d Ed. Vol. 3, Page 255, provides that the chief assistant of the department may act in the case of absence or sickness of the head of the department.

Sec. 178 (same) page 256, provides that the chief clerk of any Bureau may act in the case of absence, sickness, etc., of the superior.

Construing these sections the United States Courts have held that if such person acts it is presumed that he acted lawfully within his authority.

Keyser vs. Hitz, 133 U. S. 138.
In re Jem Yuen, 188 Fed. 350.

The provisions of the acts do not require that any particular form is necessary to comply with the statutes requiring that contracts affecting title to land of Indian Pueblos (if this power of attorney can by any scope of imagination be construed to be a contract affecting title to the land) be approved by the Secretary of the Interior.

United States vs. Candelario, U. S. Supreme Court Advance opinions, July 1, 1926, Vol. 16, page 645.

Jose Maria Ochoa, the head chief and Luis, the Papago Chief of Santa Rosa executed the power in behalf of himself and the inhabitants of the Pueblos. This was an act of the Pueblo giving Hunter the power to retain attorneys and institute the suit.

THE CHIEF HAD THE POWER TO ACT FOR THE INHABITANTS.

The documentary evidence in the case shows: In 1700, Father Kino formed a council of twenty-five (25) governors, many captains etc., (R. 204). In 1761, the governors with the Alcalde explained their contracts and questions which occur. (R. 200). In 1857, the chief had the power to surrender the individuals to the American and Mexican authorities (R. 171). In 1849, each village was governed by an old man and all by the governor of the nation (R. 198). In 1855, the head chief acted for the tribe (R. 186) In 1858 Fourteen of the Pueblos were present, represented by captains (R. 171). In 1863, the chiefs had more than ordinary intelligence. (R. 166) In 1864, the principal chief, learning of the abandoned condition of Charles D. Poston (which was communicated to Brig. Gen. Carlton) organized an escort to him. (R. 178). In 1865, in accordance with council of San Xavier Papagos raised one hundred and fifty warrors and the chief placed their men at the disposal of the United States Military authorities. (R. 168) In 1865, the Governor had the welfare of his people at heart. (R. 167) In 1874, the chiefs had knowledge of the laws and customs of

civilized people (R. 165). In 1875, Papagos lived in twenty-one villages, each governed by one great captain. (R. 164) In 1882, April 21, Ascension Rios (one of the signers to Hunter in 1880) executed a contract as chief of the Papagos of San Xavier wherein land for a right of way was granted to Arizona Southern Railroad. This agreement is executed exactly as the Hunter power of attorney and it shows authority and intelligence on behalf of the chief. (R. 177). In 1885, the Indians thought the chiefs greater than the United States Government. (R. 169)

The Power of Attorney in question executed to Hunter in 1880 reads in part as follows (R. 282):

> "Know all men by these presents, That we, Luis, Captain of the Village of Santa Rosa in the Territory of Arizona, for himself and the inhabitants of said village," etc.

The contract by Ascension Rios just referred to, reads in part as follows:

> "Articles of Agreement between Col. Sykes and Ascension Rios as chief of the Papagos of Santa Xavier" etc. (R. 177)

The court will see that the contracts made by the old New England Towns were very similar in form to the above and that such forms were the acts of the corporation. For example, see:

> "Geo. M. Blanchard of the one Part and the Inhabitants of the town of Blackstone."

Signed by individuals described as "Selectmen" held valid.

> Blanchard vs. Inhabitants of Blackstone, 162 (Mass.) 343 (1869).

Also see

Inhabitants of Stoughton vs. Paul 175 Mass. 148 —(1899)
Waterport Water Co. vs. Inhabitants of Waterport, 94 Maine 215.

The testimony shows by Indian witnesses as follows:

The leading men are advised in council what to do. (R. 75)

Whatever Con Quien (head chief) and the other captains did the people abided by it. They do what they agree. (R. 317). I have seen the first chiefs who had authority. The only way they managed their business was by council. (R. 320)

Forty years ago the chiefs would get together and Con Qinen would act as head chief. (R. 374) I understood Con Qinen to be head chief of all the captains of the villages (R. 376). He sent for all of them to come (R. 377). The Papagos thought the head chief had a great deal of power (R. 312). They went to him for their fields (R. 309-312). He claimed the land, but would not sell it. (R. 312)

THE INDIAN AGENT HAS SUPERSEDED THE HEAD CHIEF IN AUTHORITY.—(R. 310-314-374) THE TESTIMONY OF THE EDUCATED INDIANS, WITNESSES AND OTHER EVIDENCE SHOWS:

Lopez, an Indian, in pursuance of council, signed an affidavit on behalf of fifty Indians (R. 43). They delegated another to sign (R. 74). It is the custom of the head chief to transact business for all (R. 81-146-142). The Papagos looked upon their Governor as their su-

preme authority. (R. 120-123) The chief directed his men to accompany others through the Pueblo. (R. 151) When the whites desired to enter the Papago Pueblos they got authority from the captains. (R. 301)

After the council acted the chief gave consent to build a school house. (R. 322-331)

Witness Santeo, a highly educated Papago (R. 267) witness, said: If the chief wanted to employ counsel he could not without calling a council. (R. 399) He would not think of doing it in any other way. (R. 400).

Thus it may be seen that the chief had authority. Under the old New England town custom when a community acts as a town or unit and appointed officers for many years a town is presumed. Town of Laudenberry vs. Town of Andover, 28 Vt. (2 Williams) 416 (424). If a contract recites that it was made by the President and trustees of a village it is good. Parr vs. Village of G. 72 N. Y. 463, (467)

SIXTEEN DIFFERENT PAPAGOS TESTIFIED THAT THE CHIEF WOULD DO NOTHING WITHOUT CALLING A COUNCIL. (R. 158-150-159-318-322-343-346-349-352-375-378-398).

The foregoing clearly establishes that the Power of Attorney executed to Hunter was pursuant to a council.

WE NEXT ASK THE COURT'S ATTENTION TO THE MANNER BY WHICH THE RESPONDENTS' AGENTS PROCURED FROM SOME INDIVIDUAL INDIANS THE DOCUMENT REQUESTING THE COURT TO DISMISS THIS ACTION (Ex. No. 6a) (R. 405).

Under this subject we particularly refer to and discuss Assignment of Errors Nos. 53 and 54, (R. 108-109) hereinbefore set out.

The facts from the evidence are that by stipulation the attorneys on both sides of this litigation spent from January 25, 1922, until February, 1922, in the Papago Indian country taking depositions of witnesses (R. 114) and that the attorneys for petitioner were present at all times for the purpose of cross-examining the witnesses who were examined on behalf of the respondents. That the respondents' attorneys could not advise in advance just when or where the deposition would be taken, but requested petitioner's attorneys to follow them over the Papago country and as they would have a witness available the deposition party would stop and his deposition be taken. (R. 366) In the respondents party there were Mr. George A. H. Fraser, Special Asst. Attorney General, Mr. Frank Thackery, Supervisor over the Papagos of the United States Indian Department, Mr.McCormick, then United States Indian Agent, Mr. Jose X. Pablo (a Papago) employed by the Indian Department at ninety dollars per month as supervisor over Papagos in regard to their cattle, Hugh Norris (a Papago) for twenty (20) years chief of Papago Indian Police (R. 391), Boneventure Oblesser, the Catholic priest with a mission in the Papago country.

For one week, during which time, the attorneys for petitioner were lead to believe that the respondent was endeavoring to bring in witnesses (R. 406-407), Mr. Thackery, Jose X. Pablo and the local Indian Police of Santa Rosa procured a number of Indian inhabitants of Santa Rosa to sign Exhibit 6—(R. 407). Attorneys for petitioner were not advised that said petition was

being distributed and had no way of learning such fact, for the reason that the Indians were instructed not to talk to petitioner's attorneys. (R. 365-366-367-368-144-79-81-150-337) It was not until seven or eight days later and after the "deposition party" had traveled one hundred miles from Santa Rosa that the respondents' attorneys attempted to introduce this said exhibit in evidence, over the objection that it was not competent evidence; that no opportunity had been given the petitioner to cross-examine the signers and that it was self serving; the objection and a motion to strike were overruled and an exception noted. (R. 407)

The evidence shows that the representation which had been made to the Papagos previous to date of Exhibit "6" are: In 1918 Bowie, a government Indian Agent, was sent to Santa Rosa on advice of government attorneys to get facts to see what position the defendants should take to defend this suit and to get affidavits. (R. 40-41-255) Some Indians refused to sign (R. 43). He testified that he tried to get their co-operation with the officials of the Government (R. 50) and told them what a good thing the reservation was (R. 265); that the suit, if sustained in court (R. 257) would take one-half their lands from them and he wanted to impress this upon them (R. 266-271-269). He did not tell them that this suit was to prevent the government officials from throwing those lands open to settlement. He did not believe that was the fact. (R. 266) He did not tell them the reservation might be taken away from them at any time. (R. 266)

Jose X. Pablo, the stock supervisor for Papagos (the Papago Indian who interpreted at the meeting at Sells, April 20, 1918, when there were one hundred

Indians present from all over the reservation) testified: The Indians were told that the suit was to take one-half their land by Hunter (R. 308). They were not told that the suit was to establish their title (R. 307) They were told to be on their guard. (R. 329)

So in 1922, at the time Exhibit "6" was signed the Indians thought generally that this suit was to their deteriment and that the suit was to take one-half their lands. (R. 336-359-385) John Wilson, a Papago, educated at Carlisle, was so advised (R. 341) he, and many others were led to believe that the order creating the reservation gave the Papagos absolute ownership of their lands, so far as title was concerned. (R. 342-352-386) They never heard that the suit was to protect their titles. (R. 350-362)

The only witnesses examined openly upon this subject at which the petitioners were afforded an opportunity to cross-examine, were Antonio Morino who testified substantially as follows:

> The Papagos are very jealous of their land rights and if a suit should be started relative to their rights, they would want to be protected. (R. 385). We believe we have absolute ownership in all the Papago Country. If a suit should be started in Court to protect their rights we claim, we would want the court to try the case and render a judgment protecting our rights. If any man was interested enough to go into court and protect our rights we would want him to (R. 386). We want our title fixed so that it can not be taken away from us. We don't want even the government itself to be able to take away the lands that belong to the Papagos. I don't think the government is thinking of taking it away. It seems that the Government has men to protect us. We think the

reservation gives us title to the lands forever. (R. 386).

And another Papago testified:

> "If the government should say that the lands are not ours then we are willing to go to court and find out whether it is or not." (R. 379)

From the foregoing facts, and considering the fact that the Papagos who signed Exhibit No. "6" did so as individuals, and the chief did not sign it nor is it shown to be signed pursuant to council, we think defendants' Exhibit No. "6" complained of should not have been received and considered by the Court.

The records show that after 1885 Hunter did what was in his power for the Papago Indians and particularly in 1903 he petitioned the Secretary of the Interior and contended that the Papagos were the owners of the lands (R. 245).

In 1909, the respondents disregarding the plaintiff's rights, offered all the lands of the Pueblo of Santa Rose, opened to enlarged homestead entry and settlement. (Stipulation R. 138 and Map. Pl. Ex. A. same page).

In 1910 Hunter caused Brown and others to come with a view of instituting the present suit.

THE INHABITANTS OF SANTA ROSA HAD KNOWLEDGE OF PREPARATION, INSTITUTION AND PROSECUTION OF THIS SUIT AND APPROVED ALL ACTS OF THE ATTORNEYS.

The facts from the evidence are: In 1910, Brown came with information and talked to Hugh Morris,

Chief of Papago Indian Police (R. 268-394), who told Jose X. Pablo, the most intelligent Papago on the whole reservation (R. 268) and other Papago chiefs (R. 397). Brown also told Tom Day in 1910, (R. 148) and he told the Papagos (R. 149) Guittard told them from 1910 to 1915 (R. 79-84-409-410-391-370) and they approved. (R. 79-81-84-142-143) From 1913 or 1914 Edwin Santeo, an educated Papago, went amongst all the Papagos and the suit was seriously considered and discussed with the old chiefs (R. 399-400). He talked to Konderone, chief at Santa Rosa in 1915, and in 1916 they were showing considerable interest. (R. 400) Thackery, the government Indian Agent in 1914, heard of the case at that time and after the institution of the suit went to Santa Rosa and held a meeting of thirty-five or forty Papagos, including the chief and one or two head men, and he visited Day's store and interviewed him. Thackery explained the matter and some told him that men had been there to see them about the same thing, and the next three or four years he made inquiry of the different people and villages. There is not one iota of evidence that during the first three and one-half years of this suit that the Pueblo of Santa Rosa or the Indian inhabitants thereof, ever objected to the suit nor until the activity of the respondents' agents hereinbefore shown. It is a conspicuous fact in the case, that Thackery reported it to a Pueblo meeting with the chiefs and head men present and they offered no objection to the suit. On this point the court's attention is asked to the language of a New York State Court as follows:

> "The defendant moves to stay the plaintiffs' proceedings, on the ground that the attorney is

not authorized to bring the action. The instances in which such relief is proper, are rare. They should probably be limited to those in which there is actual fraud on the court; in which an attorney, without the knowledge or consent of a plaintiff, is using his name in a wrongful manner. Generally it is best that only the plaintiff himself should be allowed to complain that the action is without his authority, and that his silence on this point should be considered to give consent. There is an obvious reason why such a motion as this should be seldom granted. The plaintiff has no notice of it. For the very ground of the motion is, that the attorney for plaintiff does not in fact, lawfully represent him, and therefore, if the defendant's view of the facts is correct, the notice of motion given to the plaintiff's attorney, is no notice to plaintiff. We are asked, therefore, to prevent a plaintiff from proceeding in an action, and to do this without giving him or any one who represents him an opportunity to be heard. The Court would never do this in the case of a natural person plaintiff. But the defendant urges that the present case is different from other cases, in that the plaintiff is a quasi municipal corporation. These facts, however, appear: The pendency of this action is known to the inhabitants of the town. It has been reported to the town at a town meeting, and no opposition or objection made. It can not be said that there is a fraudulent use of the name of the town, and it seems reasonable to suppose that, if this action is conducted without the approbation of the town, the defendant or some other person could call a town meeting to direct its discontinuance. That would be a better remedy than this application. The defendant, however, insists that the authority to bring an action, can only be given at an annual town meeting or at a meeting specially called; and that an action, commenced without such authority, can not afterwards

be ratified. It is not best to decide that question of law, on an application which is addressed to our discretion. If the fact that this action was commenced without such authority is a legal defense, then the defendant should have pleaded it (as in fact he did), and the matter should be tried at the circuit. If the fact is not a legal defense, but is only available on such a motion as this, then in exercising our discretion, we should consider that the town has actual notice of this action and has not repudiated it. We ought not to interfere, without its request, to protect it from acts of an attorney whom it is implicity recognizing. If the motion is for its protection, let it make it. If it is for the defendant's benefit, let him make this defense, if it is a defense, at the trial. There has been delay in moving. The cause was at issue and noticed for trial when proceedings were stayed for the purpose of making this motion. Yet the defendant had knowledge of the facts long before.

Order suspending proceedings reversed''

The Town of Delhi vs. Graham 3 Hun 407.

This view is also taken in the case of

Republic of Mexico vs. DeArangoiz 5 Duev. 643.

A careful reading of the next authority cited shows that after the opposing party to an action, either by neglect or design fails to avail himself of the right to call upon the attorney for information as to his warrant of authority and instead permits him to state his defense by pleading in bar to the action, it would be unreasonable and contrary to all the principles of legal analogy as well as the established rules of practice and pleading, that he should (afterwards) be per-

mitted to embarrass and arrest the regular progress of the case upon the issue joined. Campbell vs. Gilbreath 5 Watts (Pa.) 423 (427).

The respondents knew of the preparation and institution of this suit from the time the witness Thackery went among them in 1914. They knew of its institution for they were promptly served, they elected to file a motion to dismiss in the nature of a demurrer and elected to stand upon this motion without further answering when the case was before the Court of Appeals in 1917. It was obviously their intention to obtain a decree upon the merits in that court and settle the litigation, but having been unsuccessful there they carried the case to this court by appeal. Never was the authority of counsel questioned up to that time.

On the third day of January, 1919, the Solicitor General of the United States informally requested the attorneys for petitioner to furnish their authority to represent their client and on the 9th day of January, 1919, such authority was furnished and no objection thereto was made at that time. Thus it can be seen that the defendants acquiesed in and recognized the authority of the attorneys for petitioner by thereafter appearing before this Honorable Court without objection on the 29th day of January, 1919, and contended for a decree of this court which could have determined this case forever. They were willing that the authority of counsel be deemed sufficient if the decree should be in their favor, but the decree being adverse to them they went back to the trial court and there raised the question and submitted a petition of individual Indians in an attempt to repudiate the authority of counsel. The individual Indians were not honestly informed as to the purpose of the suit; they were told that it

would take one-half their lands (R. 308); to be on their guard (R. 329) and they were not told that the suit was to protect their lands. (R. 307) The Indian police of Santa Rosa was active in procuring it (R. 407).

Counsel for the petitioner feel that it is proper to deny the respondents the right to raise this question after the case has been considered by the highest court of our country.

It will be remembered that the attorneys whose authority is questioned appeared as attorneys for the petitioner and was recognized as such by the respondents at all times up until this case was decided by the Supreme Court of the United States, March 3, 1919, and also recognized the attorneys for petitioner as such after respondents had filed their motion to dismiss for alleged lack of authority on June 9, 1919, by entering into stipulations to advance for trial May 26, 1922, and to close the testimony August 22, 1922, (R. 90). Thereafter, all pleadings were regularly served upon the respective attorneys to this suit without reservation or objection.

Particular attention is asked to the fact that the authority of Louis Kleindienst to represent the Pueblo of Santa Rose has at all times been recognized and the record does not show that his authority has ever been questioned. He entered into stipulations with the respondents' counsel to take all depositions in the Indian country, July 25, 1922 (R. 114). The lack of anything to the contrary in the record upon the question of authority of counsel is presumed.

6 C. J. 631, citing 255 cases
Osborn vs. Bank 9 Wheaton 738-830
Brown vs. Arnold 131 Fed. 703

Aaron vs. U. S. 155 Fed. 833
Kissick vs. Hunter 184 Pa. 174
Romiller vs. Schuster Co. 212 Fed. 348.

The Supreme Court of California has said:

"By admitting service of papers on a motion for a new trial by an attorney for defendant, without objection, and by serving papers in plaintiff's behalf on such attorney, the objection that the attorney is not the attorney of record is waived."

The opinion says:

"While it is true that said notice was signed by a different attorney, still it is apparent that any objection upon that ground was waived by appellant, in recognizing and treating the said attorney as representing the defendant on the motion for a new trial, by receiving and admitting service of papers from him in her behalf, without making or reserving any objection on that account at the time, and by serving papers in the appellant's behalf upon such attorney. Upon this subject it is said in Hayne on New Trial & Appeal, p. 59, at close of section 13: 'But where the notice is not properly signed, the successful party must reserve his objection on that account at the time it is served upon him, and not treat the notice as sufficient. If he recognizes the attorney giving the notice as the one having authority to give it, he will not afterwards be permitted to question his authority. This is the rule with respect to notices of appeal, and it undoubtedly applies to notices of intention." Smith vs. Smith, 145 California 615.

With full knowledge of the facts the respondents have proceeded with this suit for eleven years, recognizing the attorneys for the petitioner as such and dur-

ing the first four and one-half years made no question of their authority although they were possessed of full knowledge of the facts. Such procedure estop the respondents from denying the authority of counsel at this time. The head note of a case in the District of Columbia Court recites:

> "After an appearance entered at a previous term, it is too late to call for the authority to appear." Rogers vs. Commelin 20 Fed. Cases, No. 12009, 1 Cr. C. C. 536.

AUTHORITY OF COUNSEL NOT PART OF THE MERITS OF A CASE AND SHOULD NOT BE RAISED AT TRIAL.

The determination of the authority of counsel is between different parties and is tried in an entirely different manner than issues of a case are tried.

As a matter of fact, the question of the authority of counsel was legally waived when the original motion to dismiss, in the nature of a demurrer, to the bill of complaint was filed in this case in 1915.

In Vol. 6 C. J., at page 635, the rule is stated as follows:

> "The authority of an attorney to represent his alleged client cannot ordinarily be questioned at the trial."

citing cases from Alabama, Indiana, Kentucky, Maine, Michigan, New Hampshire, New York, North Carolina, Texas, Vermont, and Virginia.

Or, in an appellate court, citing Williams vs. Butler, 35 Ill., 544; Noble vs. State Bank, 3 A. K. Marsh. (Ky)., 262; Bogardus vs. Livingston, 2 Hilt. (N. Y.),

236; Shroudenbeck vs. Phoenix Fire Insurance Co., 15 Wis., 632. Such an objection should be made promptly. Williams vs. Uncompahgre Canal Co., 13 Colorado, 469; Kissick vs. Hunter, 184 Pa., 174; Mix vs. People, 116 Ill., 265 (holding that delay of two years was fatal); Mason vs. Stewart, 6 La. Ann., 736 (several years' delay held fatal); O'Flynn vs. Eagle, 7 Mich., 306 (holding that delay from May to October was fatal); preferably at the term at which appearance is first made; otherwise the adverse party waives the want of authority and consents to the appearance of the attorney. State vs. Harris, 14 N. Dak., 501; Herrel vs. Prince William County, 113 Va., 594.

The application for plaintiff's attorney to show authority should be made before a plea is filed. Rouillier vs. Schuster Co., 212 Fed., 348; Doe vs. Abbott, 152 Ala., 243, 246; Reece vs. Reece, 66 N. C., 377; Campbell vs. Galbreath, 5 Watts (Pa.), 423; Mercier vs. Mercier, 5 Dall (Pa.), 142.

Pleading the general issue seems to be a waiver of all objections to authority. Lucas vs. Georgia Bank, 2 Stew. (Ala.), 147.

See also Authority contained in 2 Enc. Pl. & Pr., 680.

This question was fully discussed in the Virginia Law Review of May, 1921, where some of the above authorities were cited, the author concluding from the cases that the matter of questioning the authority of an attorney for plaintiff could not be raised in the answer or in the plea, and also cites Bonnifield vs. Thorn, 71 Fed., 924, 927.

In the case of Gage vs. Bell, 124 Fed., 371, it is stated on page 379, as follows:

> "Necessarily it is the practice in all courts to treat the attorney appearing for a litigant as duly

authorized thereto by that litigant. The authority to appear must exist, to be sure, but it is conclusively presumed, or assumed rather, by the court, unless it is formally and by a special proceeding known to the practice called in question. 3 Enc., L. (2d Ed.), 349; Id., 375. The defendant cannot by answer or plea set up want of authority in the plaintiff's attorney, but he must make a rule upon him to show his authority, supported by affidavit as to the facts. Martin vs. Walker, Abb. Adm. 579; Fed. Cas. No. 9170; Howe vs. Anderson (Ky.), 14 S. W., 216; Hill vs. Mendenhall, 21 Wall., 453. The reasons for this rule are well illustrated by this case. The courts could not conveniently do the business of litigation if either litigant could capriciously embody in his pleadings the collateral matter of the authority of the attorneys, respectively, to appear and file their pleadings. Every litigation would degenerate into a preliminary inquiry about the attorney's dealings with his client."

See also the following cases in point:

Indiana, etc., Ry. Co. vs. Maddy, 103 Ind., 200; Louisville, etc., R. Co. vs. Newsome, 13 Ky. L. Rep. 174; Upham vs. Bradley, 17 Me., 423; Norberg vs. Heineman, 59 Mich., 210; Manchester Bank vs. Fellows, 28 N. H. 302; People vs. Lamb, 85 Hun (N. Y.), 171; Rowland vs. Gardner, 69 N. C., 53; Spaulding vs. Swift, 18 Vt., 214, 218; Knowlton vs. Plantation No. 4, 14 Me., 20; Low vs. Settle, 22 W. Va., 387; Rogers vs. Crommelin, 20 Fed. Cas. No. 12,009; Mix vs. People, 116 Ill., 265, 268, 272.

This matter is entirely on the same principle as where jurisdiction of the person in some instance is questioned after general appearance has been made and it has always been held that the objection comes

too late. Citizens Trust & Guaranty Company of W. Va., vs. Garrettson, Vol. 44, Washington Law Reporter, page 313 (S. C. D. C.); McAdoo vs. Ormes, 47 App. Cas, D. C. 364, 372 (Opinion by Mr. Justice Van Orsdel); affirmed, 252 U. S. 469.

The decree of the trial court is in two distinct parts. (R. 100) Paragraph "one" overrules the motion to dismiss for want of authority of counsel. Paragraph "two" dismisses the case upon the merits with costs in favor of the defendants.

Plaintiff appealed from the decree of the court as set forth in the second paragraph thereof and so notified counsel for defendants that it was limiting its appeal to that part of the decree only (R. 111).

The defendants below did not appeal from any portion of the decree.

A motion to dismiss for lack of authority of counsel can be made, it is true, but a defense on the merits can not be made on that ground. The parties are different. The motion to dismiss for lack of authority of counsel in reality affects counsel only. The plaintiff itself could supply other counsel and remain in court or refile its action by other counsel. In other words, the question of the authority of counsel cannot in any manner enter into the merits of the case. It is as distinct as another case would be.

Respondents not having elected to appeal or cross appeal from that portion of the decree overruling the motion to dismiss for lack of authority cannot now raise that question in any manner, shape or form.

Where only one party appeals, the other is bound by the decree of the court below, and he cannot assign error in the Appellate Court nor can he be heard if the proceedings in the appeal are correct, except in support

of the decree from which the appeal of the other party is taken. In other words, a party who does not take out a writ of error, cannot be heard to complain of any adverse rulings in the court below.

The William Bagaley, 5 Wall., 377; The Quickstep, 9 Wall., 665; The Maria Martin, 12 Wall, 31; The Mary Ford, 3 Dall., 188; Mackall vs. Mackall, 135 U. S. 167; The Des Moines, 154 U. S., 584; U. S. vs. Blackfeather, 155 U. S., 180; The Chattahoochee, 173 U. S., 540; Malarin vs. U. S., 1 Wall., 282, 287; Harrison vs. Nixon, 9 Pet., 483; Canter vs. American Insurance Co., 3 Pet., 307; Stratton vs. Jarvis, 8 Pet., 4; Buckingham vs. McLean, 13 How., 150; Compton vs. Jesup, 167 U. S., 1; Southern Pacific R. Co., vs. U. S., 168 U. S., 1; Bolles vs. Outing Co., 175 U. S., 262.

An appeal brings up for review only that which was decided adversely to appellant. Chittenden vs. Brewster, 2 Wall., 191; The Steven Morgan, 94 U. S., 599; Loudon vs. Taxing District, 104 U. S., 771, 774.

We believe that this case well illustrates the vice of permitting the question of authority of counsel to be raised at all as a plea to the merits because it does confuse the court and does tend to draw the court away from the real merits of the case. There is no doubt that the trial court was greatly confused in trying the two issues together.

The attempt to confuse this court and counsel for petitioner by injecting into the case here the matters contained in their motion to dismiss in the trial court is most inequitable. In a matter which vitally concerns the prosperity and future and even the life of these Indians, it is an attempt to throttle this suit without a determination upon the merits, to deprive the Indians of their "day in court," and to take away

from them the benefit of the Supreme Court decision which should be the charter of their liberties and the basis of their prosperity. This suit, if prosecuted to a successful conclusion and not otherwise, will put them on the sound basis of the New Mexico Pueblos.

The character of the fight made by the respondents for the last ten years and the contentions pressed by them and the history of other Indians not protected by communal titles as the New Mexican Pueblos, prove that if this suit is stifled no other similar suit will be permitted; that the organization of the Indians already crumbling will be destroyed; that the policy of misrepresentation and oppression will be carried out to its logical conclusion; that the Indians will be reduced to the pauper conditions of the ordinary reservation Indians and that in time and in a very short time, powerful interests will deprive the Indians even of their reservation and that they will be scattered and found working in the gangs upon the railroads and other public works.

The respondents have never since this suit was commenced permitted the Indians' attorneys to consult freely with the Indians, and in fact when the case came on for trial in the taking of testimony refused the attorneys any right of consultation with the Indians and warned the Indians against talking to their attorneys. It was iterated and reiterated to the Indians that the only purpose of this suit if the Indians won, was to take away half of their lands. The Indians were led to believe that they had absolute title to all these lands and that appears in the testimony of practically all of them, whereas, as a matter of fact, it is merely a reservation by proclamation and since the proclamation was made another proclamation took 500,000 acres of

this same land away (R. 28). If history repeats itself in this case it is only a matter of time until even the reservation of this land will be swept away and the Indians be left to drift whither they may to obtain a living.

It is respectfully submitted that an order should be entered by this Honorable Court sustaining the existence of authority of counsel to represent the complainant, so that this cause may be placed upon the docket for a hearing upon the merits, to the end that the decrees of the Court of Appeals and of the Supreme Court of the District of Columbia shall be reversed, with costs.

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